

Employment and Training Administration, Labor

§ 655.0

- 655.1250 Who is the official record keeper for these administrative appeals?
655.1255 What are the procedures for the debarment of a facility based on a finding of violation?
655.1260 Can Equal Access to Justice Act attorney fees be awarded?

Subpart N—Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)

- 655.1290 Purpose and scope of subpart B.
655.1292 Authority of ETA-OFLC.
655.1293 Special procedures.
655.1300 Overview of subpart B and definition of terms.
655.1301 Applications for temporary employment certification in agriculture.
655.1302 Required pre-filing activity.
655.1303 Advertising requirements.
655.1304 Contents of job offers.
655.1305 Assurances and obligations of H-2A employers.
655.1306 Assurances and obligations of H-2A Labor Contractors.
655.1307 Processing of applications.
655.1308 Offered wage rate.
655.1309 Labor certification determinations.
655.1310 Validity and scope of temporary labor certifications.
655.1311 Required departure.
655.1312 Audits.
655.1313 H-2A applications involving fraud or willful misrepresentation.
655.1314 Setting meal charges; petition for higher meal charges.
655.1315 Administrative review and de novo hearing before an administrative law judge.
655.1316 Job Service Complaint System; enforcement of work contracts.
655.1317 Revocation of approved labor certifications.
655.1318 Debarment.
655.1319 Document retention requirements.

AUTHORITY: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m), (n), and (t), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 323, Pub. L. 103-206, 107 Stat. 2149; Title IV, Pub. L. 105-277, 112 Stat. 2681; Pub. L. 106-95, 113 Stat. 1312 (8 U.S.C. 1182 note); and 8 CFR 213.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29

U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b1), 1182(n), 1182(t), and 1184; 29 U.S.C. 49 *et seq.*; sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub. L. 105-277, 112 Stat. 2681.

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*, and Pub. L. 109-423, 120 Stat. 2900.

SOURCE: 42 FR 45899, Sept. 13, 1977, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 655 appear at 71 FR 35521, 35522, June 21, 2006.

§ 655.0 Scope and purpose of part.

(a) *Subparts A, B, and C—(1) General.* Subparts A, B, and C of this part set out the procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (i) Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (ii) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required to carry out the policies of the Immigration and Nationality Act (INA), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

(2) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S.

workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Utery*, 531 F. 2d 299 (5th Cir. 1976).

Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this part set forth requirements for recruiting U.S. workers in accordance with this principle.

(3) *Construction.* This part and its subparts shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974), *Flecha v. Quiros*, 567 F. 2d 1154 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the terms and conditions of domestic workers similarly employed, *Williams v. Utery*, 531 F. 2d 305 (5th Cir. 1976); *Florida Sugar Cane League, Inc. v. Utery*, 531 F. 2d 299 (5th Cir. 1976), and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

(b) *Subparts D and E.* Subparts D and E of this part set forth the process by which health care facilities can file attestations with the Department of Labor for the purpose of employing or otherwise using nonimmigrant registered nurses under H-1A visas.

(c) *Subparts F and G.* Subparts F and G of this part set forth the process by which employers can file attestations with the Department of Labor for the

purpose of employing alien crewmembers in longshore work under D-visas and enforcement provisions relating thereto.

(d) *Subparts H and I of this part.* Subpart H of this part sets forth the process by which employers can file labor condition applications (LCAs) with, and the requirements for obtaining approval from, the Department of Labor to temporarily employ the following three categories of nonimmigrants in the United States: (1) H-1B visas for temporary employment in specialty occupations or as fashion models of distinguished merit and ability; (2) H-1B1 visas for temporary employment in specialty occupations of nonimmigrant professionals from countries with which the United States has entered into certain agreements identified in section 214(g)(8)(A) of the INA; and (3) E-3 visas for nationals of the Commonwealth of Australia for temporary employment in specialty occupations. Subpart I of this part establishes the enforcement provisions that apply to the H-1B, H-1B1, and E-3 visa programs.

(e) *Subparts J and K of this part.* Subparts J and K of this part set forth the process by which employers can file attestations with the Department of Labor for the purpose of employing nonimmigrant alien students on F-visas in off-campus employment and enforcement provisions relating thereto.

[43 FR 10312, Mar. 10, 1978, as amended at 52 FR 20507, June 1, 1987; 55 FR 50510, Dec. 6, 1990; 56 FR 24667, May 30, 1991; 56 FR 54738, Oct. 22, 1991; 56 FR 56875, Nov. 6, 1991; 57 FR 1337, Jan. 13, 1992; 57 FR 40989, Sept. 8, 1992; 69 FR 68226, Nov. 23, 2004; 73 FR 19947, Apr. 11, 2008]

§ 655.00 Authority of the Office of Foreign Labor Certification (OFLC) Administrator under subparts A, B, and C.

Pursuant to the regulations under this part, temporary labor certification determinations under subparts A, B, and C of this part are ordinarily made by the Office of Foreign Labor Certification (OFLC) Administrator (OFLC Administrator) of the Employment and Training Administration. The OFLC Administrator will informally advise the employer or agent of the name of